FILE COPY

Office-Supreme Court, U.S.
FILED
APR 22 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1461

JAY RICHARD BERGMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. B. TIETZ
410 Douglas Building
257 South Spring Street
Los Angeles, California 90012
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Opinion of the Court Below 2
Statutory Provision Sustaining Jurisdiction 2
Questions Presented and How Raised 2
Statutes and Regulations Involved 3
Statement of the Case 3
The Facts 3
Reasons for Granting a Writ 5
Argument 5
I. The I-O Claim 5
II. The II-A Claim 8
Conclusion 11
Appendix A—Opinion, United States Court of Appeals for the Ninth Circuit A1
Appendix B—Order Directing Filing of Opinion and Filing and Recording of Judgment A2
Appendix C—Order Denying Petition for Rehearing A2
Appendix D—Section 456 (j), 50 U.S.C.A. App., and Amendment V, Constitution of the United States ..A3, A5

Table of Cases

Annett v. *U. S.*, 10 Cir., 1953, 205 F.2d 689 6
Batterton v. *U. S.*, 3 Cir., 1958, 260 F.2d 233 7
Chernekoff v. *U. S.*, 9 Cir., 1955, 219 F.2d 271 10
Dickinson v. *U. S.*, 346 U.S. 389, 74 S.Ct. 152 6
Kessler v. *U. S.*, 5 Cir., 1969, 406 F.2d 151 7
Sexton v. *Barry*, 223 F.2d 220, cert. den. 77 S.Ct. 94, 352 U.S. 870, 1 L.Ed.2d 76 9
U. S. v. *Graham*, N.D.N.Y., 1952, 108 F. Supp. 794 10

U. S. v. *Haughton*, 9 Cir., 1969, 413 F.2d 736 8
U. S. v. *James*, No. 12,919 (C.A. 4, June 26, 1969), 2 SSLR 3231 7
U. S. v. *Kuwabara*, 56 F. Supp. 716 10
U. S. v. *Parcels of Land in Prince George's County, Md.*, 40 F. Supp. 436 10
U. S. v. *Wheeler*, 149 F. Supp. 445 10
Williams v. *U. S.*, 5 Cir., 1954, 216 F.2d 350 5-6

CONSTITUTIONAL PROVISIONS, REGULATIONS AND STATUTES

Constitution of the United States—
Amendment V 3, 5, 6
U.S.C.A. Const. Amends. 4, 5 10
32 C.F.R. §§ 1625, 1626.12 9
50 U.S.C.A. App. § 456 (j) 3

OTHER AUTHORITY

Publication, Scientific Manpower Commission, December, 1969, Draft Facts for Graduates and Graduate Students, 1969-70 8-9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. _____

JAY RICHARD BERGMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner of a violation of the Universal Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1969. See Appendix B to this petition.[1]

This Petition for Writ of Certiorari is filed within the required thirty days time, as extended by Mr. Justice Douglas to April 26, 1970.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

The constitutional question raised by petitioner involves the Fifth Amendment clause concerning due process. It concerns, in brief, an ipse dixit conclusion, without basis in fact.

The question involves the disposition of both a conscientious objector claim and an occupational claim duly made to the Selective Service System, raised in the trial court by written Motion for Judgment of Acquittal and briefed to the Court of Appeals for the Ninth Circuit.

---

1. This petitioner's Petition for Rehearing was denied by the Court of Appeals on February 25, 1970. See Appendix C to this Petition.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the Fifth Amendment and § 456 (j), of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.). They are set forth in Appendix D.

5. STATEMENT OF THE CASE

The indictment charged Bergman with a violation of the Universal Military Training and Service Act for refusing to submit to induction [CT 2].

Bergman pleaded "not guilty" and was tried by the Honorable Irving Hill, District Judge, sitting alone without a jury. He was found guilty and sentenced as follows: IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the maximum period authorized by law for a study as described in Title 18, United States Code, Section 4208 (c), the results of such study to be furnished this Court within three months, unless the Court grants further time not to exceed three months, whereupon the defendant shall be returned to this court and the sentence of imprisonment shall be subject to modification in accordance with Title 18, United States Code, Section 4208 (c).

A written Motion for Judgment of Acquittal was filed during the trial [CT 7 and RT , lines].[2]

6. THE FACTS

The facts are found in two places:

(1) The complete Selective Service System file of the appellant
and

(2) The oral testimony in the trial court.

2. RT refers to the Reporter's Transcript.

On February 2, 1961, appellant Jay Richard Bergman registered with Selective Service System Local Board Number 101, Los Angeles, California [Ex. 1].[3]

On November 9, 1963, the Local Board by a vote of 3-0, classified defendant I-A [Ex. 11].

On September 2, 1966, the Local Board received a letter from the employer of the appellant requesting that appellant be given an occupational deferment [Ex. 42].

On September 7, 1966, the Local Board classified appellant I-A. Appellant appealed. On March 23, 1967, the Appeal Board classified appellant I-A [Ex. 53].

On April 7, 1967, the appellant requested and received from the Local Board a Special Form for Conscientious Objectors, SSS Form 150 [Ex. 54-55]. He returned the completed form to the Board on April 19, 1967, and indicated therein that he claimed exemption as a conscientious objector from both combatant and noncombatant training and service in the Armed Forces [Ex. 56-62].

On May 1, 1967, the Local Board by a vote of 3-0, classified the appellant I-A [Ex. 12].

On September 11, 1967, the appellant appeared for an interview with the Board and presented letters from friends and his father concerning his classification [Ex. 69-81, 87-89].

After the interview, the Local Board classified the appellant I-A [Ex. 12]. He appealed and on October 30, 1967, his file was sent to the Appeal Board [Ex. 12, 94] and it, by a vote of 4-0, classified the appellant I-A [Ex. 95].

---

3. Ex. refers to the Government's Exhibit, the complete Selective Service System file on the Appellant.

On December 29, 1967, the Board mailed appellant an order to report for induction into the Armed Forces on January 16, 1968 [Ex. 98]. He reported as ordered, but refused to submit to induction [Ex. 108-110].

7. REASONS FOR GRANTING A WRIT

Both Fifth Amendment questions presented are of an importance greater than one individual's fate. The questions are national because the reach of the Selective Service System is into every hamlet, the "calls" for induction show every indication of continuing, and the percentages of registrants professing conscientious objections to war and for occupational deferments is not decreasing, therefore numerically many persons are affected.

The administrative agency's handling of these claims, and their often too summary disposition by the courts is due to insufficient guidelines, ones conforming to the demands of the Fifth Amendment.

8. ARGUMENT

The argument is being divided into two parts:

I

The I-O Claim

The Court of Appeals' decision on the I-O claim was based on, and stated as follows:

> "The scope of our review is limited to the question of whether there is a basis in fact for the classification received by appellant. His sincerity in making the I-O claim was in issue. The Board resolved that issue against him. Clearly, there was a basis in fact for the Board's action."

First, the Court of Appeals fell into the same error that the Court of Appeals in *Williams* v. *United States*,

5 Cir., 1954, 216 F.2d 350, pointed out had been committed by the trial court in *Williams*:

> "The Supreme Court has simplified the duty of courts in cases of this kind. 'The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities.' Dickinson v. United States, 346 U.S. 389, 396, 74 S.Ct. 152, 157. The District Court stated that it found such evidence, but failed to state what it was. After a diligent search, we have found none." [351].

For as Mr. Justice Jackson pointed out concerning the holding of the Supreme Court in *Dickinson*:

> ". . . Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case. . . ." (74 S.Ct. 152, 159).

The Court of Appeals merely concluded ipse dixit, that Bergman was insincere, and like the trial court and the Selective Service System, gave no supporting facts.

Bergman believes that facts are required to support any conclusion. A naked conclusion is not enough; the Fifth Amendment requires a factual basis.

Many courts are so expressing themselves. A hearing should be granted, on certiorari, to have this point thoroughly argued.

Here are samplings of the many decisions on this subject:

Annett v. *United States*, 10 Cir., 1953, 205 F.2d 689:

> "To merely state that he does not consider him sincere without giving a single fact upon which such be-

lief is predicated does not rise to the dignity of evidence." [691].

Batterton v. *United States*, 8 Cir., 1958, 260 F.2d 233:

"The Selective Service boards and the Department of Justice, rather obviously, were not convinced that the defendant here was what he claimed to be, and therefore denied his claim. It seems quite evident that there must be some affirmative evidence to support the rejection of the claimed exemption, or something in the record which substantially blurs the picture painted by the registrant and casts doubt on his sincerity or the genuineness of his claim. See Witmer v. United States, 348 U.S. 375, 382-384, 75 S.Ct. 392, 99 L.Ed. 428." [237].

Kessler v. *United States*, 5 Cir., 1969, 406 F.2d 151:

"[4] To be precise about it, the disbelief of Selective Service officials will not justify the rejection of a claim for conscientious objector status unless there is some affirmative evidence to support the rejection of the claimed exemption or there is something in the record which *substantially* (emphasis added) blurs the picture painted by the registrant and thus casts doubt on his sincerity, Batterton v. United States, 8 Cir., 1958, 260 F.2d 233." [156].

United States v. *James*, No. 12,919 (C.A. 4, June 26, 1969), 2 SSLR 3231:

"We are constrained to add that it is *not* sufficient that the board merely state its disbelief in a registrant's sincerity, for 'to sustain the denial of a claim on a mere *ipse dixit* of lack of sincerity from the Local Board or the hearing officer would create serious possibilities of abuse.' *United States* v. *Corliss*, *supra*, at 814. In short, there must be a 'rational basis' for the refusal of the Board to accept the validity of a registrant's religious claims. *Robertson* v. *United States*, 208 F.2d 166, 169 (10 Cir. 1953)." [3232].

It is thus clear that when a local board denies a conscientious objector classification in a situation where a prima facie case has been presented there must be a rational basis for such action *and* the local board must state its reasons for such action. *United States* v. *Haughton*, 413 F.2d 736, 9th Cir. (1969). This was not done in the case of Petitioner Bergman.

II

The II-A Claim

The Court of Appeals' decision on this point says, only:

> "On the II-A claim, the record supports our conclusion that there was a basis in fact for the Board's decision that appellant failed to make a prima facie showing that he could not be replaced in his work."

This is manifestly something more of an explanation than was given Bergman by his local board because its response had been a minus one: "We don't give occupation deferments." [Ex. 85]. We submit however, that it wasn't enough, that a valid factual basis must be present. The argument in Point I, above, is equally applicable here.

Particularly applicable is the reasoning of the Court in *United States* v. *Haughton*, 9 Cir., 413 F.2d 736 (1969). In that case the Court of Appeals held that when a registrant establishes a prima facie case for a classification, the local board, if it denies the claim, must state the reasons for its actions. Petitioner Bergman was not given any reason for the denial of his II-A occupational deferment claim, despite the fact that he had presented to the local board a prima facie case for such a classification.

A publication of the Scientific Manpower Commission, 2101 Constitution Avenue, N.W., Washington, D.C. 20418,

says in its December, 1969 introduction to its Draft Facts for Graduates and Graduate Students, 1969-70:

> "As was anticipated when these rulings were announced, the more than 4,000 local and appeal boards have reacted in quite different ways to requests for occupational deferment for particular activities. Reaction has varied from local boards which have granted no occupational deferments at all to those which have granted them quite generously to almost any registrant who requested one on the basis of his work activity. Many local boards awarded occupational deferments quite generously to some or all of the registrants employed in particular activities, such as teaching, scientific research, defense work, fire-fighting, police work or work with VISTA or the Peace Corps. Some boards deferred no teachers, but all policemen. Some deferred elementary teachers but no college teachers, while some others deferred city teachers only, or rural teachers only."

We conclude that a board that doesn't give its registrants *any* opportunity for a II-A classification, is acting lawlessly. At an Appearance Before Local Board, or even at an "interview" the registrant can, at least, get a glimmer of an idea, of what more in the way of evidence he should produce to meet the standards. Such an augmentation is reasonable and permissible. 32 C.F.R. §§ 1625, 1626.12. Petitioner Bergman was unlawfully deprived of such an opportunity.

" 'Due process' is a procedure which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial [or fair hearing]". *Sexton* v. *Barry*, 223 F.2d 220, certiorari denied 77 S.Ct. 94, 352 U.S. 870, 1 L.Ed.2d 76. Constitutional guaranty of "due process of law" requires observance of those general rules established in our system of jurisprudence for the security of private rights in any proceeding which may result in depriving

a person of life, liberty or property. U.S.C.A., Const. Amend. 5; *U. S.* v. *Kuwabara,* 56 F. Supp. 716. The absolute fundamentals of "due process of law" are jurisdiction, adequate notice, and a fair hearing. U.S.C.A., Const. Amend. 5; *U. S.* v. *Parcels of Land in Prince George's County, Md.,* 40 F. Supp. 436. In regard to "due process," it should be pointed out that the constitutional provision for security of person and property should be liberally construed. U.S.C.A., Const. Amends. 4, 5; *U. S.* v. *Wheeler,* 149 F. Supp. 445.

With the above in mind, petitioner Bergman contends that he was deprived of that guaranty of "due process of law" insured to him by the Fifth Amendment and the general rules of our system of jurisprudence.

Fairness requires that a registrant be given the opportunity to meet the standards set by a local board for a classification he claims. In petitioner's case the statement by his local board, "We don't give occupation deferments," made whatever evidence petitioner presented for the II-A classification inconsequential because it would have no effect upon the local board. "Here, when appellant introduced evidence at the hearing he was like a blind man striking at an invisible foe." *Chernekoff* v. *United States,* 219 F.2d 271, 9th Cir. (1955)

In this matter of the II-A classification the local board was determined to deny petitioner the II-A classification no matter what evidence he presented.

It has been held that "A full and fair disposition of the defendants' contentions at every level of the Selective Service System is the measure of their rights." *United States* v. *Graham,* N.D.N.Y., 108 F.Supp. 794, 797 (1952). With this considered, it must be concluded that the local board acted illegally toward the petitioner and deprived him of due process of law

CONCLUSION

For the above given reasons certiorari should be granted and the judgment should be reversed.

Respectfully,

J. B. Tietz
410 Douglas Building
257 South Spring Street
Los Angeles, California 90012
Attorney for Petitioner

April 25, 1970.

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAY RICHARD BERGMAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 23,706

[December 12, 1969]

Appeal from the United States District Court
for the Central District of California

Before: HUFSTEDLER, WRIGHT and KILKENNY, Circuit Judges.

PER CURIAM:

Appellant was indicted for, then tried and convicted by the Court of, a violation of the Universal Military Training & Service Act in refusing to be inducted into the Armed Forces of the United States as ordered by his Selective Service Board. He claimed I-O or, in the alternative, a II-A classification. He received I-A.

The scope of our review is limited to the question of whether there is a basis in fact for the classification received by appellant. His sincerity in making the I-O claim was in issue. The Board resolved that issue against him. Clearly, there was a basis in fact for the Board's action.

On the II-A claim, the record supports our conclusion that there was a basis in fact for the Board's decision that appellant failed to make a prima facie showing that he could not be replaced in his work.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, December 12th, 1969

Before: HUFSTEDLER, WRIGHT and KILKENNY, Circuit Judges.

Order Directing Filing of Opinion and Filing and Recording of Judgment

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Wednesday, February 25th, 1970

Before: HUFSTEDLER, WRIGHT and KILKENNY, Circuit Judges.

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed January 6, 1970 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX D

Universal Military Training and Service Act of 1951, As Amended (50 U.S.C.A. App. § 456 (j))

(j) Conscientious objectors.—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period—equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal

board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

Amendment V

Criminal Proceedings and Condemnation of Property

[Section 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Proposed September 25, 1789; ratified December 15, 1791.